

Land and Environmental Issues in Wind Energy Development in Nebraska

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ATTORNEYS AT LAW

State Laws Affecting Wind Development

- Nebraska does not have state-level land use regulations for wind development
- Other states do, or have state level “appeals” of local decisions
- Other states have state law environmental regulations that affect wind projects
- Federal law may preempt state regulation of wind projects of 80 MW or less

Local Zoning

- Many jurisdictions do not have zoning for wind projects
- Common traits of those that do:
 - Public hearing(s)
 - Special use permit / conditional use
 - Proof of other agency approvals – FAA / resource agencies
 - Setbacks from property lines, roads, and neighboring dwelling units
 - Decommissioning security or other requirements

Other Permitting Requirements

- Encroachment permits to alter or connect to public rights-of-way
- Transportation permits for overweight or oversized vehicles
- Building permits
- FAA approvals
- Environmental approvals

Effects on Agriculture/Landowners

- Direct effects of wind farm on agriculture are minimal
- Average turbine and access road takes far less than an acre out of production
- Farmer can farm nearly up to the turbine
- Produces potentially significant income for landowner over a long period of time

The Wind Lease

- There are effectively two ways that developers tie up land for wind projects
 - Lease option
 - Cooperation agreement or easement and lease

State law may dictate which is better

The Wind Lease (continued)

- Leases for wind turbines are essentially ground leases
- Easements are included for access, cables, and roads
- Wind rights are not severed from the land
- Leases may include a decommissioning guarantee
- Provisions in leases protect against bad actions by developers
- Statutory provisions protect against risks such as fraud

The Wind Lease (continued)

- Wind leases have components of a lease and an easement
 - Essentially a ground lease, with easements for cables, roads, substations and other facilities
 - Right to use land that the owner may also use
 - Right to exclusive use of land and to exclude owner
 - Typically no right to use existing facilities
 - Right to take from land
 - Not a wind right per se, but a land right

The Wind Lease (continued)

- Severing the wind rights from the land
 - Concerns about severing the wind rights from the land may be misdirected
 - Wind cannot be “harvested” without something on the ground
 - Issue does arise if one desires to transfer the wind rights separately from the land

The Wind Lease (continued)

- Legal description must contain a description of the dimensions of the wind energy easement sufficient to determine:
 - the horizontal space across; and
 - the vertical space above the burdened property that must remain unobstructed

Legislative Bill 568

- Lease/agreement expires if construction is not started within 10 years
- Prohibits severing wind from the land
- Requires a description of applicable decommissioning requirements in the lease
- Requires wind leases and easements, or an abstract thereof, to be recorded
- Limits term of wind leases and easements to 40 years, subject to renewal

Setback Issues

- Setbacks from neighboring dwelling units or other neighboring buildings can be problematic
- Issues may arise if the neighbor desires to construct a home after the turbine is built
- The neighbor's property has effectively been taken, since the setback extends over the property line

What Landowners Should Expect

- Wind farm gets completed in an efficient and fair manner when a group of landowners is approached together and that group works together
- Landowners may wish to agree on a single form of lease and select a landowner committee to negotiate directly with the developer, ensuring the developer cannot play landowners against each other
- Hiring one attorney to represent all landowners can be efficient and effective

Power and Knowledge of Landowners

- Group structure of negotiations protects landowners
- Landowners know their land and their rights best
 - Farming is landowners' livelihood; they will protect it
- Landowners' input on necessary protections is important
- Examples of protections:
 - Crop damage protection – five years out
 - Crop yield and the wind farm's interference with farming
- Landowner is landlord – wind developer is a tenant
- Landowner should have input on roads and cable routes

Developer Motivations

- Developers are entering into a potentially 40-year relationship involving hundreds of millions of dollars in equity and equipment; strong incentive to treat landowners well and have a good relationship
- Taking advantage of landowners does not benefit the developer in the long run
- Developers' experience can help structure leases and negotiations to make relationships better and easier from project to project

Developers and Landowners

- Critical to specify the property description
- Perform any necessary due diligence to verify clean title
- Encumbrances to the property which could be foreclosed and affect the desired option, or impede the developer's intended use of the property
- Leasehold title insurance policies insuring the leasehold which is created
- Subordination and non-disturbance agreements from any lienholders or crop lessees

Other Easements

- Determine delivery routes ahead of time, and obtain easements from landowners who will have their corners “cut”
- Transmission lines
- Construction, repair, removal and/or replacement of wind turbine components
- Corollary equipment to be maintained, such as meteorological tower siting

Compensation

- Per megawatt, per year basis
- Percentage of revenues available to the developer
- Verify the formula

Potential Environmental Issues

- Migrating birds, whooping crane and Prairie chickens
 - Prairie chickens create and use “leks” for mating dances and other rituals. These leks are areas on the ground to which the Prairie chickens return each year
 - Concern that wind turbines within a quarter of a mile or less of a lek may displace the Prairie chickens, but evidence is unclear
 - Survey sites for active leks and try to set turbines back from active leks by a quarter mile or more
 - United States Fish and Wildlife Service
 - Nebraska Game and Parks Commission
 - Develop plans on a case-by-case basis to mitigate for any loss of Prairie chicken habitat and for impacts to migratory birds

Potential Environmental Issues (continued)

- Take of Listed Species
- Impacts to Wetlands and Other Waters
- Stormwater Runoff
- Environmental Contamination
- Archaeology or Historic Resources

Take of Listed Species

- Impacts to listed species is biggest environmental issue with wind farms
 - Most potential impacts are to birds
 - Can be direct bird kills or displacement of habitat
 - Wind turbines kill three birds per year, on average
 - Issues when birds affected are special-status species
 - Agencies not issuing incidental take permits
 - Efforts to create Habitat Conservation Plans for certain species and wind development

Applicable Laws

- Endangered Species Act of 1973
 - 16 U.S.C.A. §§ 1531-1544
- Migratory Bird Treaty Act of 1918
 - 16 U.S.C.A. §§ 703-712
- Bald and Golden Eagle Protection Act
 - 16 U.S.C.A. §§ 668-668c

Endangered Species Act

- Prohibits “taking” listed species
- “Take” means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct
- Take allowed with permit
- Permitting process is significant

Migratory Bird Treaty Act

- Prohibits anyone to or attempt to “pursue, hunt, take, capture, kill, possess, offer for sale, sell, offer to purchase, purchase, deliver for shipment, ship, cause to be shipped, deliver for transportation, transport, cause to be transported, carry, or cause to be carried . . . any migratory bird”
- Applies to birds included in international conventions between the U.S. and Great Britain, the U.S. and Mexico, the U.S. and Japan, and the U.S. and Russia
- Some exceptions in statute, but no real permitting process; primarily an enforcement or penalty statute

Bald and Golden Eagle Protection Act

- Prohibits anyone, without a permit, from “taking” bald or golden eagles, or their parts, nests, or eggs
- The Act defines “take” as “pursue, shoot, shoot at, poison, wound, kill, capture, trap, collect, molest or disturb”
- “Disturb” means: “to agitate or bother a bald or golden eagle to a degree that causes, or is likely to cause, based on the best scientific information available, 1) injury to an eagle, 2) a decrease in its productivity, by substantially interfering with normal breeding, feeding, or sheltering behavior, or 3) nest abandonment”
- Very limited “permitting” process; primarily an enforcement or penalty statute

Wetlands and Other Waters

- Clean Water Act – Section 404
 - Difficult to avoid impacts to jurisdictional waters (wetlands or waters of the U.S.) with a wind farm
 - Typically occupy hilly terrain and include linear structures, therefore often include one or more stream or creek crossings
 - Try to keep the impacts small enough to qualify for a Nationwide Permit
 - State level permitting or review may also apply

Stormwater Runoff

- Projects increase stormwater runoff, primarily due to the construction of access roads – new impervious surface
- Typically 1/8 to 1/4 mile per turbine = three to thirteen miles in an 80 MW project
- Need to comply with NPDES permitting and prepare a Stormwater Pollution Prevention Program

Phase I Environmental Assessment

- Wind projects typically occupy land that has only been farm or ranch land
- Nonetheless, for financing purposes, most developers obtain a Phase I Environmental Site Assessment

Mitigation

- Wind development may be relatively new
- Mitigation requirements are still evolving
- Agency jurisdiction can be a question
- Impacts may be difficult to quantify
- On-site mitigation may be difficult or impossible, particularly for bird impacts
- Off-site mitigation may be preferable; take advantage of existing resources





Questions?

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